Supreme Court, U.S.
FILED
JAN 8 1996
CLERK

No. 95-888

In The

Supreme Court of the United States

October Term, 1995

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

ESTATE OF FRANK MORGAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MORGAN ESTATE, DREISESZUN, GERHART, OZAR, GIFFORD, JONAS, KIENE ESTATE, NAY, SALAZAR, AND PISTILLI

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QUESTIONS PRESENTED

1. Whether a federal district court with original jurisdiction pursuant to 12 U.S.C. § 1441a(*l*) should apply the limitations law of the forum state to a removed case.

2. Whether the special Kansas statute of limitations for actions by the Kansas Public Employees Retirement System revives previously barred causes of action pursuant to the standards of *Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958 (Kan. 1992).

LIST OF PARTIES

Petitioner is the Kansas Public Employees Retirement System, the plaintiff and appellee below.

Respondents on this brief are the Frank S. Morgan Estate, Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Harry S. Jonas, the Ralph Kiene Estate, Randall M. Nay, Tony Salazar, and Phillip M. Pistilli, all defendants, third party plaintiffs, and appellants below.

Other parties include: Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, Clifford W. Shinski, Brent Messick, Robert Crew, Michael Russell, Gage & Tucker, Shook, Hardy & Bacon, P.C., Frank Sebree, Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, and Robert Spence, all defendants below; Blackwell Sanders Matheny Weary & Lombardi, L.C., an intervenor-defendant below; and the Resolution Trust Corporation, a third party defendant below.

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Respondents the Morgan Estate, Dreiseszun, Gerhart, Ozar, Gifford, Jonas, the Kiene Estate, Nay, Salazar, and Pistilli respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's decision in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 61 F.3d 608 (8th Cir. 1995) and is included in the Appendix to the Petition at pp. 1a-16a. The order of the court of appeals denying rehearing is included in the Appendix to the Petition at p. 17a. The decision of the district court is unreported and is included in the Appendix to the Petition at pp. 22a-23a.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1995. Rehearing was denied on September 6, 1995. The Petition was filed on December 5, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1292(b), and in the district court upon 12 U.S.C. § 1441a(*l*) and the supplemental jurisdiction provisions of 28 U.S.C. § 1367.

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1441a(*l*) provides, in pertinent part:

(1) In general

Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

* * *

(3) Removal and remand

(A) In general

The Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the Corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution.

Kan. Stat. Ann. § 60-522 provides:

(a) Notwithstanding any other limitations contained in article 5 of chapter 60 of the Kansas Statutes Annotated, any civil action brought by, or on behalf of, the Kansas public employees

retirement system shall be brought within 10 years of the time in which such cause of action shall have accrued.

(b) The provisions of this section shall be part of and supplemental to the provisions of article 5 of chapter 60 of the Kansas Statutes Annotated.

(c) The limitations set forth in subsection (a) are to be construed and applied retroactively.

STATEMENT OF THE CASE

This is an investment fraud case alleging common law fraud, various tort theories, and violations of the Kansas Securities Act in connection with Petitioner the Kansas Public Employees Retirement Systems' ("KPERS") $65 million investment in high yield debt instruments issued in 1986 by Home Savings Association of Kansas City, Missouri, N.A. ("HSA"), a savings and loan association placed in receivership in March 1991. The Resolution Trust Corporation ("RTC"), a federal agency pursuant to 12 U.S.C. § 1441a(b), was appointed receiver for HSA. The Respondents here (the "HSA defendants") were all members of the HSA board of directors. The other defendants were KPERS' investment advisors (Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, and others), attorneys (Gage & Tucker and Blackwell Sanders Matheny Weary & Lombardi, L.C., as intervenor), accountants (Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, and Robert Spence), HSA attorneys Shook, Hardy & Bacon, P.C., and Frank Sebree (also an HSA board member), and a former KPERS trustee (Michael Russell).

The case was initially filed in Kansas state court, and the HSA defendants were joined in December 1991. Subsequently, the RTC, as receiver of HSA, was named as a third party defendant. Pursuant to 12 U.S.C. § 1441a(*l*), which confers original jurisdiction in the federal courts over actions to which RTC is a party and provides for their removal to any federal court where the state action is pending or the financial institution was located or in the District of Columbia, RTC removed the entire action from the Kansas state court to the United States District Court for the Western District of Missouri. The district court denied KPERS' motion to remand, and the Eighth Circuit affirmed that decision in a prior interlocutory appeal. *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994).

A pivotal issue in this case has been the question whether KPERS' claims were brought within the time periods of the applicable statutes of limitations. Kansas law provides a two-year limitations period for tort actions, Kan. Stat. Ann. § 60-513, and a three-year limitations period for statutory claims, *id.* § 60-512(2). KPERS' funds were invested in 1986, but this action was not commenced as to the HSA defendants until December 1991. The HSA defendants filed a motion to dismiss in the state court on March 17, 1992, relying on the Kansas statutes of limitations. On May 22, 1992, the Governor of Kansas signed into law a new ten-year statute of limitations applicable only to "any civil action brought by, or on behalf of" KPERS. 1992 Session Laws of Kansas, Chap. 321 (codified at Kan. Stat. Ann. § 60-522). Subsequently, on November 25, 1992, the defendants filed their initial

summary judgment motion in the federal district court after the RTC's removal, acknowledging the new statute but noting its inapplicability because the legislature had not specifically expressed an intent to revive barred actions. In its 1993 session, before the motion was heard in the district court, the Kansas legislature amended the new ten-year statute, providing that it should be "construed and applied retroactively." Kan. House Bill 2211 (1993); Kan. Stat. Ann. § 60-522(c).

In ruling defendants' motion on the statutes of limitations, the Missouri federal district court found that the new Kansas statute of limitations should govern this action, rather than the law of the forum, Missouri. That issue was the subject of Respondents' interlocutory appeal to the Eighth Circuit.[1]

The court of appeals held, in a unanimous decision, that the limitations law of the forum state must govern the case. Pet. App. at 12a. The court rejected the contention that the "look back" rule developed in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), for changes of venue in diversity jurisdiction cases, should apply here. Pet. App. at 8a-12a. In those cases the Court had found that state law causes of action transferred to a new venue pursuant to 28 U.S.C. § 1404(a) take with them the statutes of limitation applicable in the transferor jurisdiction. *Van Dusen*, 376 U.S. at 635-37; *Ferens*, 494 U.S. at 526. Relying on the

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[1] The district court also held that KPERS was subject to statutes of limitations because it acted in a proprietary capacity in making its investment in HSA. KPERS did not seek review of this ruling in the interlocutory appeal to the Eighth Circuit.

Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and on the "absence of any directive from Congress," the court of appeals found it was "not authorized to import a body of venue law derived from an entirely different statute into section 1441a(*l*)(3)." Pet. App. at 10a. In particular, the court found that it must "take *Reyno* as a caution against importing the *Van Dusen-Ferens* doctrine into a statutory scheme foreign to that which it was created to effectuate." Pet. App. at 11a.

On the state law issue, the court of appeals found that Kan. Stat. Ann. § 60-522 did not revive barred actions because it was not consistent with the standards of *Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958 (Kan. 1992). Pet. App. at 14a-16a. As a consequence, Missouri limitations law, Mo. Rev. Stat. § 516.120(5) (the "borrowing statute"), directed that the shorter Kansas two- and three-year statutes should apply. Pet. App. at 16a. The court of appeals thus reversed the district court and remanded the case for the determination of whether KPERS' claims are time-barred under the applicable Kansas statutes. *Id.* Rehearing was denied without dissent or comment. Pet. App. at 17a.[2]

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[2] Proceedings have continued in the district court, with Respondents and other parties filing motions for summary judgment based on the statutes of limitations. Those motions are currently scheduled for a hearing in late January 1996.

REASONS FOR DENYING THE WRIT

1. The Petition does not present any issue as to which there is a conflict of decisions or which constitutes an important or substantial question of federal law. The asserted conflict presented in the Petition is illusory. The federal law issue presented in the Petition is governed by an existing decision of this Court, and the state law issue is likewise governed by an existing decision of the Kansas Supreme Court. The Petition presents narrow issues concerning a special federal removal statute applicable to the Resolution Trust Corporation and a special state statute of limitations applicable only to the Kansas Public Employees Retirement System. These matters are not well-suited for review on a writ of certiorari. The court of appeals' decision on this interlocutory appeal does not merit further review.[3]

2.a. As to the first question presented by both Petitioner and these Respondents for review, this Court has held that the *Van Dusen* choice of law rules developed under 28 U.S.C. § 1404(a) are unique to cases under that statute, and do not form any common law of venue applicable in non-section 1404(a) cases. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253-54 (1981). The court of appeals followed the *Reyno* decision in finding that the *Van Dusen* approach should not apply to removals pursuant to 12 U.S.C. § 1441a(*l*). Pet. App. at 10a-12a. The distinctions between transfer of a diversity case under 28 U.S.C.

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[3] As the "thrift crisis" wanes, the federal law question is even less likely to arise in other cases. The RTC went out of existence on December 31, 1995, and was succeeded by the Federal Deposit Insurance Corporation. 12 U.S.C. § 1441a(m).

§ 1404(a) and removal of this federal question case under section 1441a(*l*) are manifold. Section 1404(a) provides a discretionary opportunity for federal courts to send litigation to a more convenient forum. Section 1441a(*l*) provides a federal agency with an absolute right to remove an entire action to expressly designated federal courts. In *Reyno*, the Court distinguished *Van Dusen* on similar grounds. The *Reyno* Court found *Van Dusen* inapplicable in the context of *forum non conveniens* dismissals, stating:

> [*Van Dusen*] focused on "the construction and application" of § 1404(a). Emphasizing the remedial purpose of the statute, [*Van Dusen*] concluded that Congress could not have intended a transfer to be accompanied by a change in law. The statute was designed as a "federal housekeeping measure," allowing easy change of venue within a unified federal system. The Court feared that if a change in venue were accompanied by a change in law, forum-shopping parties would take unfair advantage of the relaxed standards for transfer. The rule was necessary to ensure the just and efficient operation of the statute.

454 U.S. at 253-54 (footnotes and citations omitted). The *Reyno* Court's narrow construction of *Van Dusen*, in a case where it might have seemed appropriate to apply the precedent, counsels hesitance in extending *Van Dusen* to new areas, such as this federal question case involving a removal statute unique to the federal system. The court of appeals decision was premised on this view:

> In contrast to section 1404(a), which was intended to be merely a "housekeeping" measure, section 1441a(*l*)(3) was part of FIRREA, a statute that was passed at the height of a

> national crisis and was intended to help resolve that crisis, partly through the instrumentality of the RTC. We would ignore *Reyno* if we relied on language from section 1404(a) cases emphasizing a plaintiff's privilege to select the forum and if we disregarded the apparent effect of section 1441a(*l*)(3) in permitting the RTC to choose its forum.

Pet. App. at 12a. In summary, *Reyno* resolves the first question presented by the Petition.[4]

b. The purported conflict of decisions presented in the Petition is illusory. In *Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 883 (1994), a case described in the Petition as "utterly contrary to the analysis" of the court of appeals, the Seventh Circuit considered the meaning of 15 U.S.C. § 78aa-1(a), a limitations provision recently added as section 27A of the Securities Exchange Act of 1934, in the context of a transfer of venue pursuant to 28 U.S.C. § 1404(a). The new limitations provision directed courts to look to the law of "the jurisdiction" as of a precise date in determining limitations issues. The Seventh Circuit held that the language of section 27A and the holdings of *Van Dusen* and *Ferens* compelled application of the law of the transferor forum. 8 F.3d at 1125. In contrast with *Eckstein*, this case does not involve a section 1404(a) venue transfer or a statutory directive similar to section 27A. Indeed, the

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[4] The Court also clarified its view of plaintiffs' "forum shopping" prerogative in *Reyno*, stating that "the deference accorded a plaintiff's choice of forum has never been intended to guarantee that the plaintiff will be able to select the law that will govern the case." 454 U.S. at 256 n.24; *see* Pet. App. 11a-12a.

statute here supports a contrary approach. As the court of appeals held, the removal provision at issue here was part of legislation that "manifest[s] an extreme concern with the savings and loan crisis and willingness to give the RTC broad powers in dealing with the crisis." Pet. App. at 10a. Thus, the court found that it would disregard section 1441a(*l*) to apply the law of the transferor forum:

> From the historical context and from the language of section 1441a(*l*)(3), it seems likely that Congress would have been more concerned with the *RTC*'s ability to predict what the controlling law would be. This would be best served by letting the RTC control the choice of law.

Pet. App. at 12a. In summary, there is no conflict of decisions with the Seventh Circuit's *Eckstein* decision that would support the grant of a writ.

3. As to the second question presented by both Petitioner and these Respondents for review, Petitioner urges a summary reversal on the ground that the court of appeals ruled incorrectly on a state law issue. The court of appeals' decision, however, rested squarely its reading of recent Kansas Supreme Court precedent, and Petitioner's contentions are but a disagreement with the court of appeals' interpretation of state law. The issue concerns whether a new Kansas statute of limitations applicable only in actions brought by KPERS revives barred causes of action, and thus may be applicable in this case. Reviewing the statute pursuant to *Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958 (Kan. 1992), the court of appeals found: "[The statute] falls far short of what *Harding* requires. *Harding* was on the books at the time the Kansas legislature added section 60-522(c); we can

only conclude that the legislature did not intend to revive lapsed actions, since it did not include the language the Kansas Supreme Court had so recently required as evidence of such an intent." Pet. App. at 15a.[5] As the Petition acknowledges, the determination of such state law questions is ordinarily left to the courts of appeals. No exceptional circumstance is present here that would justify an exercise of this Court's discretionary review or summary reversal powers as to this question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] The court of appeals observed that this interpretation of the state statute made it unnecessary to reach the "troublesome" state and federal constitutional issues raised by Respondents. Pet. App. at 16a.